87-1683

No. _____

In The

Supreme Court of the United States

October Term, 1987

DALE FOLTZ,

Petitioner,

-vs-

ERNEST ALEXANDER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER RESPONDENT'S *SANDSTROM* CLAIM IS BARRED BECAUSE OF HIS FAILURE TO SHOW CAUSE FOR AND PREJUDICE FROM HIS FAILURE TO OBJECT TO THE INSTRUCTION AT TRIAL?

II.

WHETHER *SANDSTROM* v *MONTANA*, 442 US 510 (1979) SHOULD BE APPLIED RETROACTIVELY?

III.

WHETHER THE JURY INSTRUCTION, ALTHOUGH VIOLATIVE OF *SANDSTROM* v *MONTANA*, 442 US 510 (1979), WAS HARMLESS BEYOND A REASONABLE DOUBT?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed January 26, 1988, and is reported at __ F2d __ (1988). The decision of the United States District Court for the Eastern District of Michigan, Southern Division, was filed on December 9, 1986. The decision of the Michigan Supreme Court was filed on December 4, 1985, and its order denying reconsideration was filed on February 25, 1986. The decision of the Michigan Court of Appeals was filed on May 24, 1985. Copies of all these opinions are included in the Appendix to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed January 26, 1988. The jurisdiction of this Court is invoked under 28 USC 1254(1). The decision of the Court of Appeals is based

on *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979); *Rose* v *Clark*, 478 US ___; 106 S Ct 3101; 92 L Ed 2d 460 (1986); *Conway* v *Anderson*, 698 F2d 282 (6th Cir, 1983), *cert den* 462 US 1121; 103 S Ct 3092; 77 L Ed 2d 1352 (1983) and *Cook* v *Foltz*, 814 F2d 1109 (6th Cir, 1987), *cert den* 108 S Ct 1109 (1987).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the Due Process Clause:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> United States Constitution, Amendment XIV, § 1.

STATEMENT OF FACTS

Respondent Ernest Alexander was charged along with his wife, Sheila Annie Alexander, with murder in the first degree, MCLA 750.316, for the shooting death of John Sweden at the Hazel Park Racetrack in Oakland County, Michigan, which occurred on June 13, 1975.

On September 16, 1975, Respondent's wife pled guilty to an added count of manslaughter before the Honorable Farrell E. Roberts of the Oakland County Circuit Court. On November 3, 1975, she was sentenced by the same judge to two years probation.

Respondent's trial by jury was held before the Honorable Farrell E. Roberts on September 22, 23, 25, 26, 29, 30 and October 2 and 3, 1975. At the conclusion of the trial, Respondent was found guilty as charged of first degree murder. On November 6, 1975, Respondent was sentenced by the same judge to life imprisonment with credit for 146 days served.

Testimony at trial came from over forty witnesses and was heard on eight different days.

Maurice Evans had been at the Hazel Park Racetrack on the evening of June 13, 1975, with the victim, John Sweden, and another friend, Tom Miller. (T, 69) On the way out of the racetrack the victim stopped to talk with a young lady while Evans and Miller walked farther. (T, 70) The victim had walked with the young lady, Sheila Alexander, for about a minute when her husband, the Respondent, came up and began talking to the victim. (T, 71) The conversation turned into an argument and then the Respondent and the victim began to wrestle. (T, 72)

As Evans and Miller went back, Respondent jumped up and said, ". . . be here when I come back." (T, 72, 98) Evans saw no strong blows struck by either side and did not believe that either appeared hurt. (T, 72) Evans saw no blood on the Respondent after the scuffle. (T, 99) Respondent's wife followed him from the track. (T, 72) Respondent left at a normal walking pace. (T, 73) Evans, Miller and the victim left a minute later. (T, 73)

Evans saw Respondent again with his wife shortly thereafter. (T, 74) Respondent hollered, "Hey, what you gonna do now." The three stopped and turned around. (T, 74) Evans heard Sheila Alexander say, "Shoot him, Ernest, shoot him." (T, 75) The victim pushed Evans into some bushes. Evans heard two shots, jumped up and began to run. (T, 75)

Mrs. Alexander explained that she had pled guilty to manslaughter in this case because her lawyer advised

her of it and because she did not have any witnesses and they guaranteed her probation. (T, 827) Prosecution rebuttal witness Nancy Miner, Oakland County Court Reporter, read from her stenographic notes that on September 16, 1975, she had taken down Sheila Alexander's plea of guilty before Judge Roberts. (T, 848) Ms. Miner further explained that Mrs. Alexander had stated during the plea that she had told Alexander to shoot the man and that he did shoot the man. (T, 848)

Tom Miller, a friend of the victim, heard the victim ask Sheila Alexander whether she had bet the 5-2 combination in the race. (T, 101) Miller saw Respondent come running over and inquire of his wife to whom she was speaking. (T, 103) Respondent told Miller, Evans and the victim that they had better "get the heck on" and then repeated it. (T, 103)

Miller saw the Respondent run over and brush up against the victim like a slap. (T, 104) Then the victim hit the Respondent, who fell, and Miller pushed the victim away. (T, 104, 137, 138) The Respondent got up and the victim hit him again and they began fighting anew on the floor. (T, 104, 138) Miller saw Respondent's wife hitting the victim across the back with her purse. (T, 104)

Miller saw Respondent get up and run to one side and say, "Just give me one minute." (T, 105) Respondent and his wife ran out of the grandstand door. (T, 105) Miller heard a woman scream and saw Respondent and his wife running through the crowd toward him, Evans and the victim. (T, 106) Respondent came up to them with a gun. (T, 106) Respondent's wife pounded him on the back and said, "Kill him, go ahead and shoot him." Miller heard two shots and saw the victim fall. (T, 107)

Ann Clayton, a racetrack patron, attended the races the night of the crime with Willie Ann Norris and Ophelia Walker. (T, 247, 260) Ms. Clayton saw two men running, one of them being the Respondent. (T, 238, 239) Respondent fell and the other man fell on top. Ms.

Clayton also saw a lady with a pocketbook hit the other man. (T, 238) Respondent got up and said, "Just wait a minute, wait till I come back." (T, 240) Ms. Clayton had seen the other man kick the Respondent before he was hit by the lady with the purse. (T, 242) Respondent then walked toward a gate outside. (T, 240) Ms. Clayton did not hear any shots.

Ms. Willie Ann Norris saw a fight under the grandstand between two men and a woman. (T, 248-249) She too saw the victim fall on the floor with the Respondent. She saw them wrestling and saw the woman hitting the victim with her purse. (T, 249) Ms. Norris heard the Respondent leave and holler back that he was going to get the victim. (T, 250) After she heard two shots, she ran out and saw the victim on the ground. (T, 257)

Ms. Ophelia Walker saw the fight between a man and a woman and another man. (T, 261) She heard Respondent remark that "You just got a minute." (T, 263, 273, 274, 277) She heard two or three sounds like gunshots and saw the victim outside, bleeding. (T, 264) She also testified that she heard Respondent say as he was leaving the fight, "Wait, son of a bitch, I'll be back." (T, 273-274, 277)

Joseph Blazers, who sold peanuts at the racetrack, heard a shot and saw a man fall. He did not see anyone with a weapon. (T, 479) Blazers had been watching the fight between the two men. (T, 485)

Respondent testified that on the night of the crime, he went to the racetrack at about 11:40 p.m. to pick up his wife. (T, 698-700) Respondent saw his wife coming toward him and saw three guys walk up and get in front of his wife. One of the three snatched her by the arm. (T, 700) Respondent told the three that she was his wife and one of the three claimed he did not care and started calling Respondent a "punk" and "mother fucker." Respondent took his wife by the arm and

started walking away when the victim, John Sweden, hit him and started kicking him. (T, 701) Respondent explained that the victim had knocked a tooth out of his mouth and had busted his lip. (T, 703) Respondent denied hitting the victim and said he was only trying to protect himself. (T, 704) Respondent ran to get to his car and thought about the gun in the car. Respondent claimed that he got the gun out of the car to protect himself and to go back to look for his wife. (T, 707, 710, 734) Respondent knew that the gun was loaded. (T, 757)

Respondent ran into his wife by the gate. (T, 710, 735) The victim and his friends kept coming and Respondent's wife told him to look out. (T, 710) The victim was leading the other two. (T, 712) Respondent told them to stop and the victim kept coming. (T, 712, 739) Respondent testified that he did not want to shoot the guy, he was just trying to keep him from hurting him. (T, 712, 752) The victim was about five feet away and advancing when Respondent shot. (T, 713, 739) Respondent had told him to stop but he tried to rush Respondent. Respondent pulled the trigger and shot the gun. (T, 713, 740, 741, 752, 757) Respondent claimed that he had never shot a gun before in his life. (T, 713) Respondent knew the gun was loaded when he pulled the trigger. (T, 741, 752, 757)

After the shooting, Respondent's wife came up to him. (T, 714) Respondent stayed there and walked around for a minute while she left for the car. Respondent left and started walking toward 10 Mile Road, saw his wife and got in the car. Respondent denied giving the gun to his wife. (T, 715) Respondent explained that as the police came up behind them, he threw the gun out the car window. (T, 718)

Respondent did not remember telling the victim to just wait there because he was going to be right back. Respondent explained that he was mad that night and

might have said something he did not remember saying. (T, 729)

Respondent's wife, Sheila Alexander, also testified. (T, 758) She explained that after betting on the final race she saw her husband and started walking toward him. (T, 768) Men came up behind her. (T, 769) The victim told her he knew she got the last race. (T, 770, 805) She shook her head no and started walking away when the victim grabbed her arm. At that point, Respondent walked up. (T, 770)

Respondent asked if they were bothering her. The victim called him a "motherfucker" and asked what was it to him. (T, 771) Respondent said she was his wife and the victim said he did not give a "fuck." (T, 772) An argument then began and, according to Mrs. Alexander, the victim was trying to hit the Respondent. (T, 772, 806-809) Mrs. Alexander explained that the victim hit the Respondent and Respondent fell. Then the victim kicked the Respondent. (T, 773) At that point, she went over to help Respondent. She hit the victim with her purse. (T, 774-775)

Mrs. Alexander further testified that after being beaten three times the Respondent got up and ran out the door. (T, 779) She did not hear anything before the shooting but did see Respondent shoot the victim. (T, 787-788, 826) After the shooting, she got the keys to the car from the Respondent and got the car. (T, 791) She saw the Respondent walk off and then she drove toward 10 Mile Road. (T, 792)

Mrs. Alexander claimed that she had not seen the gun before the shooting and did not know that Respondent had had it. (T, 793) She recalled police saying before they put her in a police car that she smelled like gunpowder.

Joseph Omiatek's testimony differed substantially from that of the other witnesses. Omiatek was leaving

the racetrack about twenty feet behind a man he had seen elbowing other patrons earlier that evening. (T, 281-282) Omiatek heard two shots and saw that man with his hand raised with a gun in it. The man then ran, throwing the gun under a tree. (T, 283) Omiatek testified that Respondent was not the man with the gun. (T, 287)

Donald Smith was leaving the racetrack the night of the crime when he heard two shots (T, 169) which seemed like three at the time. (T, 203, 214) Off-duty Detroit police officer Gary Porter also heard shots, as did his wife, Vicky Porter. (T, 227, 234) Smith saw Respondent with a gun at his side and with a woman with him walk away from a body lying on the ground. (T, 170-171) Smith saw the Respondent give the gun to the woman, who put it in a drawstring-type purse. (T, 172, 185) The couple then walked away nonchalantly, talking as they walked. (T, 185)

Smith saw the couple by a car and wrote down the license number on the Detroit Free Press newspaper he was carrying. (T, 173) Smith quadruple-checked the license number (T, 173, 196), which was PFP 129. (T, 175) Smith later gave the newspaper to Hazel Park Officer Larry Wallen. (T, 499)

After the woman put the gun in her purse, she got in the car with that license number. (T, 206) At that time the Respondent took off running. (T, 196)

Officer William Palovich heard a couple of sounds like firecrackers or shots. (T, 370) Shortly thereafter a man (Mr. Smith) told him that he had a license number of a car involved in the shooting. Palovich put the license number out over his police radio. (T, 372)

Officer Thomas Sanders heard the report of the license number and spotted it. (T, 380-382) After stopping the car, Officer Heady got Respondent out of the car while Officer Sadow got Respondent's wife out.

(T, 382) When Officer Sanders advised the Respondent that he was under arrest for attempted murder, Respondent responded, "I know." (T, 389) While Officer Sanders was booking Respondent, he noticed blood on the Respondent's neck and told Sergeant Sadow, who removed the blood with a white handkerchief. (T, 391, 524)

Sergeant Sadow of the Hazel Park Police Department participated in the stop of Respondent's car. (T, 518) When Respondent's wife got out of the car, he smelled what he thought to be the odor of burned gunpowder. (T, 522) Officer Heady stated that Sergeant Sadow mentioned at the time of the stop that he smelled gunpowder. (T, 547-548) Heady smelled the odor of gunpowder also. (T, 548)

Officer Duane Freel was assigned to look for the murder weapon. (T, 555-556) In a grassy area off of 10 Mile Road he found a .38 six-shot Colt snubnose bluesteel revolver with four live rounds and two spent shells in it. (T, 557)

Dr. Thomas J. Petinga, a pathologist for the Oakland County Medical Examiner, performed an autopsy on the victim. (T, 585-586) Petinga found one bullet in the muscles of the anterior chest wall and another in the chest cavity of the victim. (T, 589) Petinga concluded that a gunshot wound to the chest was the cause of the victim's death. (T, 592)

Following closing arguments and instructions, the Respondent was found guilty of first degree murder. Respondent appealed by right to the Michigan Court of Appeals, which affirmed his conviction. *People* v *Alexander*, 76 Mich App 71 (1977). The Michigan Supreme Court denied Petitioner's *pro se* application for leave to appeal and request for appointment of counsel, *People* v *Alexander*, 402 Mich 826 (1977) (Levin, J., dissenting), as well as his motion for reconsideration.

Respondent then brought a *pro se* motion for new trial, which was denied by the trial court in an order dated December 15, 1978. (*People* v *Alexander*, No. CR 75-23712 FY) A second motion for new trial, filed through retained counsel, was denied on January 23, 1980. Petitioner's application for leave to appeal from the order denying new trial was denied by the Michigan Court of Appeals. (*People* v *Alexander*, No. 49673, January 8, 1981) The Michigan Supreme Court again denied leave to appeal. *People* v *Alexander*, 411 Mich 1018 (1981).

Respondent then unsuccessfully sought habeas corpus relief in Federal District Court and the Sixth Circuit Court of Appeals. Respondent thereafter successfully filed a delayed application for leave to appeal in the Michigan Court of Appeals in which he, *inter alia*, maintained for the first time that the trial judge had erroneously instructed the jury on intent and malice under *Sandstrom*. The Michigan Court of Appeals granted Appellant's application for leave in an order dated March 7, 1984.

Following oral argument, the Michigan Court of Appeals affirmed Respondent's conviction in an unpublished per curiam opinion dated May 24, 1985. A copy of this opinion is included in the Appendix. (E-1)

The Michigan Supreme Court denied Respondent's application for leave to appeal on December 4, 1985 (D-1), and denied Respondent's motion for reconsideration on February 25, 1986. (C-1)

Respondent brought a second complaint for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The District Court denied Respondent's application for habeas relief in an opinion filed December 9, 1986. A copy of this opinion is included in the Appendix. (B-1)

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. In an opinion recom-

mended for publication (A-1), the Court reversed the judgment of the District Court and issued a mandate ordering that Respondent be retried within 90 days or else released. The District Court, pursuant to that mandate, issued its order on March 1, 1988 in accordance with the opinion of the Court of Appeals. A motion to recall the mandate and for a stay of proceedings is currently pending in the Sixth Circuit Court of Appeals.

Petitioner, represented by the Michigan Attorney General through the time of decision of the United States Court of Appeals but now represented by the Oakland County Prosecutor, brings this Petition for a Writ of Certiorari.

JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Federal Jurisdiction was invoked in the Court of Appeals under 28 USC 2254.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's first question is whether Respondent's *Sandstrom* claim is barred because of his failure to show cause for and prejudice from his failure to object to the instruction at trial. The United States Court of Appeals failed to analyze the instant case for cause and prejudice. This Court has held that where a criminal defendant has failed to make a timely challenge as required by a state's procedural rules, that defendant must show cause for that failure and further must show prejudice resulting from it when attacking the conviction by writ of habeas corpus. *Francis* v *Henderson*, 425 US 536; 96 S Ct 1708; 48 L Ed 2d 149 (1976); *Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977). In the case at bar, Respondent did not object

to the jury instructions as given, did not challenge them in his appeal of right, did not challenge them in his second jaunt through the Michigan judicial system, did not challenge them in his first foray into the federal system, but only raised the *Sandstrom* issue for the first time on his third trip through the state appellate courts. Although the Michigan Court of Appeals granted Respondent's Delayed Application For Leave To Appeal, the court ultimately declined to review the merit of the issues raised. Accordingly, it was error for the Sixth Circuit Court of Appeals to order that the writ of habeas corpus be issued inasmuch as the state court declined to review the claim on a procedural default basis and Respondent failed to show cause and prejudice.

When collaterally attacking a state court conviction, a habeas corpus petitioner must (1) show cause for his failure to raise the issue timely as required by state procedure and (2) make a showing of actual prejudice. *Francis* v *Henderson, supra*; *Wainwright* v *Sykes, supra*. Michigan law requires an objection to preserve *Sandstrom* error. *People* v *Woods*, 416 Mich 581; 331 NW2d 707 (1982), *cert den* 462 US 1134; 103 S Ct 3116; 77 L Ed 2d 1370 (1983). Timely objection is also required by state court rule.

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.
>
> MCR 2.516(C), formerly GCR 1963, 516.2

It is undisputed that Respondent did not object to the instructions as given and did not do so until he began his fourth sashay into the review process.

The Michigan Court of Appeals granted Respondent's Delayed Application For Leave To Appeal in which he first raised the matters complained of in his complaint for writ of habeas corpus. Following briefing and oral argument, the court issued its opinion affirming Respondent's conviction. The Michigan court held that although the instruction was violative of *Sandstrom*, *Sandstrom* was not to be applied retroactively where the defendant did not raise the issue in his appeal of right. *Woods, supra*. In effect, the court said the *Sandstrom* issue had not been preserved for appeal.

A federal court must look at the basis for the state court's denial of relief. The federal court must first determine if the Michigan appellate courts declined the jury instruction on the merits (as a *Sandstrom* issue *per se*) or on the basis of a procedural default. *Cook* v *Foltz*, *supra*, at 1112. In order to do so, the federal habeas court must look at the argument presented to the state court if the basis for the state court's decision is at all unclear. *Id.*; *Raper* v *Mintz*, 706 F2d 161, 164 (6th Cir, 1983), citing *Martinez* v *Harris*, 675 F2d 51 (2d Cir, 1982), *cert den* 459 US 849; 103 S Ct 109; 74 L Ed 2d 97 (1982).

> If the state prosecutor only argued the merits of the petitioner's claim and did not raise the procedural default issue, the federal court may conclude that the state court relied on the merits, thus avoiding the application of the cause and prejudice test. If the prosecutor only argued the issue of the petitioner's procedural default, then the default is assumed to be the basis of the state court's decision and the cause and prejudice test applies. If the prosecutor argued either the merits or the procedural default in the alternative, the federal habeas court should con-

> clude that the state court did not use the merits of the petitioner's claims as a basis for its decision, thus making the cause and prejudice test applicable.
>
> *Cook* v *Foltz, supra,* at 1112.

In the case at bar, the prosecutor had argued the merits and the procedural default in the alternative. Accordingly, the federal habeas court should have concluded that the state court did not use the merits of the Respondent's claims as a basis for its decision, thus making the cause and prejudice test applicable.

In his brief on appeal to the Michigan Court of Appeals, the prosecutor argued that the alleged error with respect to the jury instructions had not been preserved due to Respondent's failure to raise a timely objection. *People* v *Tate,* 134 Mich App 682 (1984). The prosecutor also went on to discuss the merits of Respondent's contention. In its opinion, the Michigan Court of Appeals stated that although the type of instruction given was later forbidden in *Sandstrom* v *Montana,* the Michigan Supreme Court had held that *Sandstrom* was not retroactive except to cases in which the issue had been raised while pending on direct appeal when *Sandstrom* was decided. *Woods, supra.* The court then disposed of Respondent's *Sandstrom* claim, stating, "[Respondent's] direct appeal did not raise this issue and was resolved before the *Sandstrom* decision." *People* v *Ernest Alexander,* Court of Appeals Docket No. 72565, rel'd May 24, 1985, p. 2 (*reproduced at* E-2). Although the court went on to find the error harmless beyond a reasonable doubt, the fact that the court considered the prosecutor's argument that the issue had been waived, and then resolved the case on this procedural default basis, requires that the cause and prejudice test apply. *Cook* v *Foltz, supra,* at 1112.

The Sixth Circuit opinion in the case at bar mentions the cause-and-prejudice test and makes fleeting

reference to the applicable cases but summarily and too hurriedly concludes that that test is not applicable.

> The case at bar is not one in which we need be concerned with the question whether there was good cause for the failure of [Respondent's] counsel to make a timely objection to the jury charge, or the question whether [Respondent] was prejudiced thereby, or the question of cause and prejudice in connection with the failure to assert instructional error in the initial appeal. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Unlike *Cook* v. *Foltz*, where the denial of habeas relief was affirmed on the ground that the defendant's failure to make any contemporaneous objection gave the Michigan appellate courts an unassailable procedural basis for affirmance of the conviction on direct appeal, the present case is one in which the Michigan Court of Appeals waived the procedural defect, allowed a second appeal, and addressed the underlying constitutional question on the merits. Under these circumstances, we are obliged to do likewise.
>
> *Alexander* v *Foltz*, ___ F2d ___ (6th Cir, 1988), Docket #87-1003, slip opinion p 14 (*reproduced at* A-15).

The Sixth Circuit purported to distinguish *Wainwright* v *Sykes*, and *Cook* v *Foltz* by concluding that the Michigan Court of Appeals "waived the procedural defect, allowed a second appeal, and addressed the underlying constitutional question on the merits." *Id.* In so determining, the Sixth Circuit erred, plain and simple.

The Michigan state courts did not waive the procedural defect. On the contrary, Respondent's argument was specifically rejected because, under Michigan law, *Sandstrom* is not applied retroactively where the issue was not raised on a defendant's appeal of right. Accord-

ingly, the issue was not preserved and the Michigan Court of Appeals ruled against Respondent on the basis of this procedural default. The fact that the court granted Respondent's delayed application for leave to appeal is of absolutely no significance where the court subsequently held in reviewing the case that the issue was waived for failure to raise it previously. Granting Respondent's application for leave to appeal cannot be seen as waiving the procedural defect where the court issued an opinion specifically holding that that same procedural defect precluded review. This Honorable Court, too, has in the past noted probable jurisdiction only later to vacate that decision or rule that whatever issue was being presented had been waived due to some procedural matter. Merely granting an application for leave to appeal does not waive a procedural defect.

The Michigan Court of Appeals' ruling that the *Sandstrom* issue had not been preserved is definitive — the State of Michigan did not waive the procedural defect. The Sixth Circuit erred in concluding that it had and thus in failing to apply the cause and prejudice test. The Sixth Circuit should have concluded that since Michigan ruled against the Respondent on a procedural default basis, Respondent must satisfy the cause and prejudice test to pursue a *Sandstrom* claim. *Cook* v *Foltz, supra,* at 1112.

Nothing in the record or in the briefs purports to offer any cause for Respondent's failure to object. As the Sixth Circuit noted in *Cook* v *Foltz,*

> [F]ailure to show cause is not vitiated by the unavailability of the *Sandstrom* doctrine at the time of trial. Counsel for petitioner [the state criminal defendant] had at that time "the tools to construct" a constitutional claim since the issue arose after *In re Winship* [397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970)]. *See also Engle* v. *Isaac,* 465 U.S. 107, 131, 102 S.Ct. 1558, 1573,

> 71 L.Ed.2d 783 (1982); *McBee* v. *Grant* [763 F2d 811 (6th Cir, 1985)]. Since we agree with the district court that petitioner has failed to show cause, we need not discuss whether prejudice resulted from the *Sandstrom* error. Accordingly, we hold that petitioner's *Sandstrom* claim is barred because of his failure to show cause for and prejudice from his counsel's failure to object to the instruction at trial.
>
> 814 F2d at 1112.

Thus, Respondent's *Sandstrom* claim is barred; the Sixth Circuit erred in proceeding to discuss prejudice where the issue was not properly before the Court for failure to show cause. Accordingly, it was error to reverse the District Court and issue a mandate ordering that a writ of habeas corpus be issued. This Court should grant a writ of certiorari, reverse the judgment of the United States Court of Appeals, and reinstate the judgment of the United States District Court.

II.

Petitioner's second question is whether *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979) should be retroactively applied. The United States Court of Appeals for the Sixth Circuit has given *Sandstrom* full retroactive effect. *Conway* v *Anderson*, 698 F2d 282 (6th Cir, 1983), *cert den* 462 US 1121; 103 S Ct 3092; 77 L Ed 2d 1352 (1983). The position of the Sixth Circuit conflicts with the holding of the Michigan Supreme Court on this issue. *People* v *Woods*, 416 Mich 581 (1982). The issue of *Sandstrom*'s retroactivity has never been addressed by this Court.

In the instant case, Respondent Alexander was convicted of first degree murder in a well-tried case in 1975. Four years later, in 1979, this Court decided *Sandstrom*. Nine years after the decision in *Sandstrom*, the United States Court of Appeals, following Sixth

Circuit precedent, applied *Sandstrom* retroactively to Respondent.

The Constitution neither compels nor prohibits retroactive application of new constitutional rules. *Linkletter* v *Walker*, 381 US 618, 629; 85 S Ct 1731; 14 L Ed 2d 601 (1965). In *United States* v *Johnson*, 457 US 537; 102 S Ct 2579; 73 L Ed 2d 202 (1982), this Court established a three-fold test to be applied to the *Linkletter* test. The first *Johnson* rule is that a decision of the Court which only applies settled precedent to new fact situations will be retroactively applied. The second *Johnson* rule is that a new rule which is expressly declared to be a clean break from past precedent will be prospectively applied. The third *Johnson* rule is that a decision by this Court that the trial court lacked authority to convict or punish will be retroactively applied.

An application of the *Johnson* rules to *Sandstrom* provides little guidance. None of the three rules precisely fits the holding in *Sandstrom*.

In *Sandstrom*, this Court found a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" improper under the Due Process Clause of the Fourteenth Amendment. A reasonable juror could interpret such an instruction as creating a presumption or as shifting the burden of persuasion to the accused. The goal of *Sandstrom* was to insure that "only the guilty are criminally punished." *Rose* v *Clark*, 478 US ___; 106 S Ct 3101; 92 L Ed 2d 460, 472 (1986).

Although *Sandstrom* relies on prior cases which analyzed presumptions in light of the reasonable doubt standard, *Sandstrom* is neither the application of settled precedent to new fact situations nor a clean break with the past. *Sandstrom* relies primarily upon *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970), retroactively applied by *Ivan* v *City of New*

York, 407 US 203; 92 S Ct 1951; 32 L Ed 2d 659 (1972) and *Mullaney* v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), held retroactive in *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977). *Winship* held that a conviction may stand only upon proof beyond a reasonable doubt of every fact necessary to show the elements of the crime charged. *Mullaney* struck down rebuttable presumptions which explicitly shifted the burden of proof to the defendant on any element of the crime charged.

Sandstrom represents an evolution of the constitutional principles recognized in *Winship* and *Mullaney*. *Sandstrom* is not an application of settled precedent, a clean break with the past or a challenge to the trial court's authority. To determine retroactivity, this Court must examine these three factors: 1) the purpose to be served by the new rule, 2) the extent of reliance on the old rule, and 3) the effect on the administration of justice of retroactive application of the new rule. *Stovall* v *Denno*, 388 US 293, 297; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

The purpose of the rule is to insure that only those who are guilty are criminally punished. In *Rose* v *Clark*, *supra*, this Court examined the possible effect a *Sandstrom* violation might have on a jury verdict to determine whether a harmless error analysis could be applied. This Court recognized that the truth-finding function of the jury is not substantially impaired by a *Sandstrom* violation when it found that a *Sandstrom* violation is not the equivalent of a directed verdict of guilty.

> When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v *Johnson*, 460 US 73, 96-97, 74 L Ed 2d 823, 103 S Ct 969 (1983) (Powell, J., dissenting). In many cases, the predicate facts con-

clusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. See, e.g., *Lamb* v *Jernigan*, 683 F2d 1332, 1342-1343 (CA 11, 1982), cert denied, 460 US 1024, 75 L Ed 2d 496, 103 S Ct 1276 (1983). In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt. See *Connecticut* v *Johnson, supra*, at 97, 74 L Ed 2d 823, 103 S Ct 969 (Powell, J., dissenting); Jeffries & Stephen, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale LJ 1325, 1388, n 192 (1979).

Rose v *Clark*, 97 L Ed 2d 472.

The possibility of unreliable results due to a *Sandstrom* instruction depends upon the unlikely occurrence that an *entire jury* first perceives and then impermissibly interprets a single phrase in lengthy jury instructions. *Sandstrom* represents a situation that is fundamentally different in degree from previous cases where new rules implicating the reasonable doubt standard have received complete retroactive effect. *Winship, supra*; *Mullaney, supra*.

The difference in degree between the *Sandstrom* instruction rule and the rule in *Winship* and *Mullaney* justifies giving substantial weight to the other two *Stovall* factors, i.e., the extent of reliance on the old rule and the effect of the retroactive application of the new rule on the administration of justice. Consideration of these factors cuts strongly against retroactive application of *Sandstrom*. *United States* v *Spiegel*, 604 F2d 961, 969 (5th Cir, 1979).

In *People* v *Woods*, 416 Mich 581 (1982), the Michigan Supreme Court closely examined *Sandstrom* and its predecessors, *Winship* and *Mullaney*, to determine

whether *Sandstrom* should be retroactively applied. The Court first found that *Sandstrom* differed in great degree from *Winship* and *Mullaney* because the "truth-finding-function is not substantially impaired in a *Sandstrom* situation." *Woods, supra,* 620. The Court then looked at the other two *Stovall* factors and held:

> The last two factors in the *Linkletter-Stovall* approach are the reliance on the old standards and the effect on the administration of justice. In Michigan, instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, *People* v *Medley,* 339 Mich 486; 64 NW2d 708 (1954); *People* v *Hodges,* 196 Mich 546; 162 NW 966 (1917); and by the Court of Appeals, *People* v *Nelson,* 35 Mich App 368; 192 NW2d 682 (1971); *People* v *McBride,* 30 Mich App 201; 186 NW2d 70 (1971). Conceivably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
>
> Given this reliance, the effect full retroactivity would have on Michigan's system of justice is unacceptable. Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. Taking this into consideration with the purpose of the *Sandstrom* rule, we feel full retroactivity is unwarranted.
>
> *Woods, supra,* 620-621; footnotes omitted.

The Court then limited the retroactivity of *Sandstrom* to those cases pending on direct appeal when *Sandstrom* was decided. *Woods, supra,* citing *United States* v *Johnson, supra.* In the instant case, Respondent Alexander was convicted in 1975. His conviction was affirmed by the Michigan Court of Appeals in his

appeal by claim of right in 1977. *People* v *Alexander*, 76 Mich App 71 (1977). His application for leave to appeal was also denied by the Michigan Supreme Court in 1977. *People* v *Alexander*, 402 Mich 826 (1977). *Sandstrom* should not be retroactively applied to Respondent. Such a retroactive application of *Sandstrom* puts a heavy burden upon the People of the State of Michigan to retry a murder case after a lapse of some thirteen years.

The balance of factors favors limited retroactivity at best. *Sandstrom* should not be retroactively applied to cases where the judgment and all direct appeals were final by the date of *Sandstrom*'s decision. This Court should grant this petition for a writ of certiorari and hold that *Sandstrom* is not fully retroactive.

III.

Petitioner's third question asks this Court to review the Sixth Circuit's application of *Rose* v *Clark*, *supra*, to the facts of this case. In *Rose* v *Clark*, this Court recognized that a *Sandstrom* violation may have very little effect on a jury verdict because a jury cannot presume malice from predicate facts without first finding those facts beyond a reasonable doubt. *Rose* v *Clark*, 97 L Ed 2d 472. In the instant case, the Sixth Circuit merely recited the evidence presented on both sides, said it was "balanced" and reversed the District Court in a published decision. A misapplication of *Rose* v *Clark* by the circuit to which that very case was remanded could have a far-reaching negative effect. To preclude this possibility, this Court should review the facts of the instant case in light of *Rose* v *Clark*, *supra*.

Respondent had gotten into a scuffle with the victim over the victim's having spoken to Respondent's wife in a manner not acceptable to the Respondent. The testimony was that neither person appeared hurt (T, 72), and that Respondent was not bleeding when he left. (T, 99)

Respondent said, "Just give me one minute" (T, 105), and told the victim to "be here when I get back." (T, 72, 98) Respondent left at a normal walking pace. (T, 73) The Respondent returned to his car, obtained a gun he knew was loaded, and came back in search of the victim. When the Respondent found him, he brandished the gun and screamed, "What you gonna do now?" The Respondent's wife was coaxing him, "Shoot him Ernest, shoot him." (T, 75, 107)

This testimony was related not only by the victim's two companions, but by several disinterested bystanders. The Respondent testified that he knew the gun was loaded, that he pointed it at the victim, and that he pulled the trigger and shot the gun. (T, 713, 740, 741, 752, 757) He also testified that he had not wanted to shoot the victim. (T, 712, 752)

After the shooting, Respondent gave the gun to his wife and the two of them returned separately to their car in a nonchalant manner. (T, 185) They drove off together and threw the gun into a nearby field.

The jury knew and the Sixth Circuit seemed to recognize that self-defense was not a viable option open to the Respondent. The testimony of eyewitnesses did not corroborate a single point of Respondent's defense. No rational juror could have concluded that Petitioner lacked a premeditated and deliberated intent to kill. The *Sandstrom* violation committed at this trial was harmless beyond a reasonable doubt.

In *Francis* v *Franklin*, 471 US ___; 105 S Ct 1965; 85 L Ed 2d 344 (1985), this Court found an instruction which shifted the burden of proof to the defendant to be violative of *Sandstrom*. The court below had found that the *Sandstrom* violation could not have been harmless error. The defense was accident, and the evidence of intent was not overwhelming. This Court affirmed the Court of Appeals on the harmless error question, noting that "[t]he primary task of this Court

upon review of a harmless error determination by the Court of Appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis* v *Franklin*, 85 L Ed 2d at 361, n 10. It does not appear from the Sixth Circuit's opinion in the instant case that the court "undertook a thorough inquiry" into the evidence. The opinion merely recites the evidence and calls it "balanced" despite the lack of corroboration of Respondent's testimony. The Sixth Circuit's "analysis" is incorrect under *Rose* v *Clark*, *supra*.

> We agree that the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court. See *id.*, at __, 92 L Ed 2d 480-481. Harmless error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?
>
> *Rose* v *Clark*, 92 L Ed 2d 473, n 11.

In addition to a thorough review of the evidence of intent, Petitioner contends that the record should be examined in other respects as well. Whatever instructions were given to the jury should be reviewed and the *Sandstrom* instruction must be viewed in the context of all the instructions that were given. *Cupp* v *Naughten*, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1973). The objected-to instruction is set forth in the Appendix. (F-1)

Respondent's theory of the evidence was that the shooting had been provoked by the decedent and that Respondent had acted in self-defense. Thus, according to Respondent, he shot the decedent in order to protect himself and his pregnant wife. He also maintained that immediately prior to the shooting, his wife had been accosted by decedent and his companions and that

the decedent had beaten him severely when he had attempted to come to her aid. (T, 700-718, 751, 752, 928-931) At trial the court instructed the jury on Respondent's theory and the law of self-defense. The text of the instruction is set forth in Appendix F.

The trial judge charged the jury that they could return a verdict of first degree murder, second degree murder, or manslaughter. He explained that the element of "premeditation" distinguished the crimes of first and second degree murder. Premeditation was defined in part as follows:

> The difference between murder in the first degree and murder in the second degree is that murder in the first degree is a killing done willfully and with premeditation while in murder in the second degree, the element of premeditation is absent. By premeditation is meant a design in the mind of the [Respondent] to commit the murder. Premeditation is to think about beforehand by a thought process undisturbed by hot blood. The time interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look although the minimum time necessary to exercise this process is incapable of exact determination. To convict the [Respondent] of guilty of murder in the first degree, it must appear that the killing was deliberate and premeditated.
>
> (T, 957-958)

The court also instructed the jury on manslaughter in part as follows:

> Manslaughter is the unlawful killing of one human being by another without malice, express or implied. It may be an intentional killing. The killer may intend to kill the deceased but it is

> brought about by some great provocation; that is, the killer has been excessively provoked and as a result of such provocation and while under its spell, the accused killed the deceased.
>
> (T, 958-959).

Finally, the court instructed the jury that the People had the burden of proving Respondent guilty beyond a reasonable doubt and that Respondent was presumed innocent throughout trial. (T, 953)

Respondent did not show how the erroneous instructions on malice worked to his disadvantage. Since the Respondent's theory was provocation and self-defense, and the court instructed the jury in part that Respondent would be justified in using as much force against the victim as he thought would be reasonably necessary for his protection, it is submitted that Respondent was simply not prejudiced by the court's instruction that malice could be implied from an "unprovoked, unjustifiable or inexcusable killing." If the jurors had believed Respondent's theory, they would have, consistent with the court's instructions, found him not guilty, or guilty only of second degree murder or manslaughter. The evidence that Respondent was the aggressor and was guilty of a cold-blooded, premeditated attack, however, was overwhelming.

Thus, the evidence showed that Respondent, after being beaten by the decedent, threatened him before he left the grandstand area. After uttering his threat, Respondent left his wife behind, returned to his car, took out a revolver which he knew was loaded, and went off in search of Sweden. Upon finding Sweden, he was heard to remark "What you gonna do now?" and shot the decedent from a distance of approximately five (5) feet. Following the shooting, Respondent and his wife walked nonchalantly from the scene. (T, 71-74, 98, 103-105, 137-138, 238-249, 261, 273-277, 485, 707-710,

734, 757) See *People* v *Alexander*, 76 Mich App 71, 81-84 (1977).

The jury's rejection of the self-defense theory, therefore, was attributable not to the challenged instructions, but rather, to the weight of contrary evidence which undermined Respondent's theory. Indeed, it must be remembered that the jury did not merely find Respondent guilty of second degree murder, which requires only malice, it found Respondent guilty of first degree murder which required them to find that Respondent possessed a "design in the mind" to commit murder. In light of Respondent's theory of the evidence, the court's instructions on malice were not prejudicial. See: *People* v *Plozai (On Remand)*, 139 Mich App 802, 806-808 (1984).

Respondent, however, maintains that he was prejudiced because part of his theory at trial was that the gun accidentally discharged. Respondent's contention is not supported by the record. Although Respondent testified that he had never fired a gun before the date of the murder (T, 713), he conceded that he knew the gun was loaded and pulled the trigger in self-defense when the decedent rushed him. Respondent never claimed that the gun discharged accidentally. (T, 741, 752, 757) It is at once apparent, then, that Respondent's testimony about his limited experience with guns was not offered to show that the shooting was accidental, but was offered in an attempt to show that he was a normally-peaceful individual who was provoked into violence, and that he regretted causing decedent's death. Indeed, in closing argument, Respondent's counsel never argued that the shooting was accidental, but rather that Respondent acted in self-defense. (T, 927-930, 931-932) Thus, defense counsel argued in part:

> . . . The Court will no doubt charge you that you must look into what he believed at that time. He was beat. There's no question. He testi-

fied to that. His wife testified to that and other witnesses testified to that, that he was knocked down once, twice or three times and kicked. There's no question he lost a tooth. There's no question in my mind that that blood was his. You don't go downtown and get bloodied and come back after it and then go to the track with it on. This is silly.

What was in his mind after he fled there after being knocked down twice or three times, whatever? How much can he take? I say to you, John Sweden was the aggressor and the Court will charge you where the aggressor puts something in the motion, this man has a right to defend himself if he felt himself in danger and he came out to get this gun as he told you he did. Then nobody say[s] he didn't. (T, 297-298);

and,

How much abuse is this man supposed to take? There's a man, a hundred and eighty-five pounds to his a hundred forty or whatever and he's beat to the ground, twice, three times. Bloody, tooth knocked out. The law says he has a right to protect himself. And why did he go back there? He told you right there, this witness stand, he got the gun, going back to seek his wife, find her, get her out of there. He fled from John Sweden. That's in his testimony. He left. He was beat. He ran out of there. The witnesses tell you that? No. They want to say, I'm gonna get you, I'm gonna kill you. This is what he says. But I say to you, ladies and gentlemen of the jury, that testimony did not come off that witness stand. And we have a right to urge you that he has the right to protect himself. The Judge will charge you in self-defense. You have the right to use whatever means that he thought, not that you thought if you were in that position but if the man thought at that time and I say that his thoughts

> were to get his wife. He told you that. There's nowhere else did he say anything different. And he has the right.
>
> (T, 929-930).

In any event, since the jury necessarily found Respondent guilty of a deliberate and premeditated killing, it is clear that they not only rejected Respondent's theory of self-defense, but also any possible theory of accident. Respondent was not prejudiced by the court's instructions on malice.

Furthermore, a *Sandstrom* error may be harmless if the defendant has conceded the issue of intent.

> In presenting a defense such as alibi, insanity or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.
>
> *Connecticut* v *Johnson*, 460 US 73; 103 S Ct 969; 74 L Ed 2d 823 (1983).

In the case at bar, Respondent disputed that he intended to kill the victim; he did not dispute the fact that he intended to get the gun knowing it was loaded, that he intended to aim it at the victim, or that he intended to pull the trigger. He merely expressed the rather suspect claim that he did not intend to shoot. In light of all the testimony regarding obtaining the gun, Respondent's threats, and his nonchalance following the murder, the jury properly inferred that Respondent had acted with malice and that the murder was premeditated, even if that premeditation spanned only a matter of minutes instead of days. The jury rejected Respondent's theory of self-defense. The facts were all in the record from which they could and did determine that, notwithstanding Respondent's counsel's argument, the Respondent did have murder in his heart.

In *Francis* v *Franklin, supra,* Justice Powell wrote a dissenting opinion. Justice Rehnquist, with whom Chief Justice Burger and Justice O'Connor joined, also dissented. Both dissents examined the challenged instruction in the context of all the instructions as a whole. Both dissents found that the other instructions prevented the challenged instruction from impermissibly shifting the burden of proof to the defendant. The dissenting opinions held the challenged instruction consequently did not violate *Sandstrom* v *Montana, supra.*

In the instant case, the type of analysis used in the dissenting opinions of *Francis* v *Franklin, supra,* applied to the whole jury instructions in the instant case, will result in a finding that the *Sandstrom* violation was harmless beyond a reasonable doubt.

The Sixth Circuit applied *Rose* v *Clark* incorrectly. This Court should grant this petition for a writ of certiorari and hold the *Sandstrom* violation was harmless beyond a reasonable doubt.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit or, in the alternative, summary reversal of the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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DATED: April 5, 1988

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

DECISION

— *RECOMMENDED FOR FULL TEXT PUBLICATION* —
See, Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed January 26, 1988)

(ERNEST ALEXANDER, Petitioner-Appellant, v. DALE FOLTZ, Respondent-Appellee — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 87-1003)

Before: KEITH, MILBURN and NELSON, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

Put on trial by the State of Michigan, Petitioner was convicted of first degree murder for admittedly having shot and killed a man with whom he had been in a fight after the man made advances to Petitioner's wife. The central issue in the trial was Petitioner's state of mind at the time of the shooting: the State presented evidence tending to show premeditation and malice, and Petitioner presented evidence tending to show he had acted in the heat of passion, in self-defense, or both.

Several highly questionable instructions were included in the trial court's charge to the jury, including an instruction that "the law presumes every man intends the usual consequences which accompany his acts." Counsel for the State conceded, in oral argu-

ment before this court, that under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), there was error in the jury charge. (In *Sandstrom* the Supreme Court disapproved, on federal constitutional grounds, a state court instruction that said "[t]he law presumes that a person intends the ordinary consequence of his voluntary acts.")

Sentenced to life imprisonment, Petitioner applied for a writ of habeas corpus under 28 U.S.C. § 2254. The federal district court denied Petitioner's application, holding that any error in the jury instructions was harmless beyond a reasonable doubt.

We shall reverse the judgment of the district court; it seems to us that a rational juror could well have found, under proper instructions, that the State had failed to prove all the elements of first degree murder beyond a reasonable doubt. Lacking confidence that the jury's verdict would have been the same even with instructions that contained no error, we conclude that Petitioner is entitled to a new trial.

I

The events out of which the criminal case arose occurred at a Detroit area racetrack on Friday, the 13th of June, 1975. Petitioner drove to the track shortly before the last race to pick up his 22-year-old wife, whom he had left there earlier in the evening. The woman was about three months pregnant.

Parking his car near the racetrack entrance, and leaving the couple's three-year-old son in the vehicle, Petitioner entered the area beneath the grandstand and spotted his wife looking at race results on a television screen. As he started walking toward her, Petitioner testified, three unknown men approached her, and one of them "snatched her by the arm." Petitioner evi-

dently did not hear what was said, but his wife testified that the man asked her "Did you get the last race?" She shook her head and started walking off, as she told the jury, whereupon the man stepped in front of her, grabbed her arm, and said "Why don't you come and help me spend some of this money I won?"

When Petitioner reached the group, according to his wife's testimony, he asked if the men were bothering her. Lacing his words with obscenities, the man who was holding her arm said "What is it to you?" Petitioner replied "That's my wife." Petitioner testified that the man responded "I don't care who she is" and started calling Petitioner "all types of names . . . ."

Eyewitness accounts of what happened next contained some variations, but the jury could easily have concluded that the man knocked Petitioner to the ground one or more times and kicked him while he was down, breaking one of Petitioner's teeth; that Petitioner's wife swung her purse at the assailant; that one of the assailant's companions grabbed the wife around the waist and pulled her away; and that when Petitioner was able to regain his feet, he ran out to his car shouting "Be here when I come back," or "Just give me one minute!"

When he reached the car Petitioner opened the trunk and took out a loaded revolver that he claimed to have purchased for protection while driving a taxi. Thus armed, Petitioner testified, "I went back to look for my wife."

The evidence was in conflict as to when Petitioner's wife actually left the area where the fight occurred, but Petitioner testified that on his return he found her coming out the gate. The three men were apparently ahead of her, but Petitioner said he did not see them at

first. His wife allegedly shouted "Look out," and Petitioner then saw the men coming toward him, the assailant in the lead. Petitioner testified that he told the man to stop, but "he rushed me and that's when I shot the gun." Petitioner said the man was about five feet away at the time of the shooting. According to the somewhat inarticulate account given by Petitioner on direct examination,

> "I told them to stop, you know, and he kept coming. I was pleading and I, you know, just shot it, you know, and like, you know, I mean I didn't mean to shoot the guy. I . . . [was] just trying to keep him from hurting me no more."

When asked on cross-examination why he had pulled the trigger, Petitioner testified as follows:

> A. "I was mad, you know. Angry, you know, and I said, you know, guy come up on me, beat me and stomp me, you know, stomp me, teeth, mouth bleeding."
>
> Q. "Did you intend to kill this man . . . ?"
>
> A. "No, sir."

The man's two companions had a different version of what happened immediately before the shooting; they said that Petitioner shook his gun in the assailant's face and shouted "Hey, what you gonna do now," while Petitioner's wife said "Shoot him, Ernest, shoot him," or "Go ahead, kill him, go ahead and kill him, go ahead and shoot him!" The wife denied having said anything of the sort, and Petitioner testified that he did not remember her saying anything. (The wife pleaded guilty to manslaughter prior to Petitioner's trial, and admitted then having told Petitioner to shoot; when she took the stand at Petitioner's trial, however, she claimed she had

lied earlier because of the State's promise that she would not have to go to jail if her guilty plea were accepted. She needed to stay out of jail, she said, in order to care for her young son.)

Immediately after the shooting, Petitioner testified, his wife asked him about the baby in the car. She then went to the car, while Petitioner stayed behind. Petitioner testified that he became frightened, left the scene of the shooting, and was picked up by his wife in the car. A witness gave the license number to the police, and soon thereafter an officer spotted the car and pulled it over. Petitioner threw the gun out the car window before his arrest, but the police recovered the weapon the next day. Petitioner was brought to trial a few months later.

II

After the jury had been impaneled, the prosecutor made an opening statement outlining the State's case and suggesting that the evidence would show beyond a reasonable doubt that Petitioner murdered the decedent "feloniously, deliberately, willfully, and with malice aforethought and premeditation . . . ." (See Mich. Comp. Laws Ann. § 750.316, defining the crime of first degree murder in terms that include "any . . . kind of wilful, deliberate and premeditated killing . . . .") Counsel for Petitioner reserved his opening statement, contenting himself with a request that the court "instruct the jury that I don't have to prove anything . . . ." The court gave such an instruction.

The prosecutor proceeded to call some 37 witnesses, and presentation of the State's case took approximately a week. Counsel for Petitioner, addressing the jury for the first time since it had been impaneled, then gave an opening statement that framed the main issue thus:

> "We'll bring out all the facts we know that happened there and then leave the matter in your hands for your determination as to what, if there was a homicide, the degree, or if there wasn't under the rules of evidence as Judge Roberts will describe them to you and *the matter will then be for you to decide whether or not John,*[1] *or Ernest Alexander had murder in his heart, whether he intended to kill anybody or not.*" (Emphasis supplied.)

With that, Petitioner was called to the stand; his testimony was followed by that of his wife. The State presented two rebuttal witnesses, after which Petitioner and his wife again testified briefly. Closing arguments followed.

The prosecutor presented a final argument that may fairly be described as concise, logical, and persuasive. Petitioner's counsel, who told the jury that he had been trying cases for more than 50 years, responded with a more discursive argument, summarizing the State's case in considerable detail and urging, again, that the State had failed to prove that Petitioner "had murder in his heart."

Much of the ensuing jury charge was unexceptionable. After explaining that Petitioner was accused of having murdered the decedent feloniously, deliberately, willfully and with malice aforethought and premeditation, the court gave the following instructions on burden of proof and presumption of innocence:

> "The burden of establishing the proof of the case is upon the People, and in order to justify you as jurors rendering a verdict of guilty, it

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[1] "John" was the name of the decedent; Petitioner's counsel not infrequently referred to Petitioner as "John" by mistake.

> must be proven beyond a reasonable doubt that this Defendant has committed the offense charged here and at the time charged and as I have said to you, it is necessary for you to decide in your deliberations whether or not that has been shown beyond a reasonable doubt.
>
> "The Defendant in this case is presumed to be innocent of the charge brought against him here and that presumption of innocence abides with him throughout the entire trial of the case until he is proven beyond a reasonable doubt by the testimony given to be guilty of the charge brought against him. The mere fact that he is here on trial, that he has been arrested and brought into court should not be considered by you as in any way to raise a presumption that he is guilty."

This was followed by instructions on reasonable doubt, on the weight to be given the testimony of the accused, on the effect of Petitioner's prior criminal record, and on the use of circumstantial evidence.

The court next told the jury that the charges against Petitioner embraced three separate offenses, adding that "the law makes it mandatory that you be instructed as to the different elements which constitute each offense so you may determine the grade or degree of crime which was committed." (There was no objection to this suggestion that the shooting was necessarily criminous in some degree.) The court went on to define murder as the willful and unlawful killing of a human being against the peace of the State, with malice aforethought, express or implied; the court explained the difference between first-degree murder and second-degree murder in terms of the presence or absence of premeditation.

After giving a definition of premeditation, the court defined manslaughter — the third offense embraced in the charging document — as the unlawful killing of one human being by another without malice, express or implied. An intentional killing might be without malice, the court explained, if brought about by some great provocation, "but it must be done while still in the heat of passion and before the passions have had time to subside and the blood to cool."

Turning to the definition of malice, the court instructed the jury as follows:

> "The term malice as used in these definitions signifies a wrongful act done intentionally, without legal justification or excuse. The real test of malice is to be found in the presence or absence of adequate cause or provocation to account for the homicide. Possibly, I can make this clearer by an illustration. If one without just cause inflicts a wrong upon another, we call him malicious so when one without any legal provocation, justification, or excuse, intentionally kills another, we call him a murderer. *The law implies from an unprovoked, unjustifiable or unexcusable killing, the existence of that wicked disposition which the law terms malice of forethought [sic]. If a man kills another suddenly and without provocation, the law implies malice and the offense is murder.* If the provocation is such as must have greatly provoked him so that he acted from sudden passion caused by some great provocation, the killing would be manslaughter. The instrument with which the killing was done may be taken into consideration because the intention to kill, in the absence of evidence showing a contrary intent, may be

inferred from the use of a deadly weapon in such a manner that the death of the person assaulted would be the inevitable consequence.

A pistol is within the class of things the law defines to be a dangerous or deadly weapon.

The law presumes every man intends the usual consequences which accompany his acts but it is the claim of the Defendant in this case that what he did was in self-defense and that the deceased was the aggressor. Now, there are occasions when a killing of one person is excusable homicide. The only such occasion with which you are concerned here is the extent to which a man may go and defend himself under attack." (Emphasis supplied.)

After lengthy and detailed instructions on self-defense, the court ended its charge by telling the jury that there were four possible verdicts: "Guilty of murder in the first-degree or murder in the second-degree or manslaughter or not guilty."

When the jury had retired, the court asked if counsel were satisfied with the instructions. Petitioner's counsel responded as follows:

> "I followed your instructions, Your Honor. I can't find anything to add. I think that you did — pardon me for not standing. I am old — touch upon the presumption of innocence and attach it to the Defendant, did you say that?
>
> THE COURT: I did.
>
> [PETITIONER'S COUNSEL]: And reasonable doubt, I'm sure. I believe your honor touched all bases."

After the jury had deliberated a little over an hour, it sent the court a message requesting certain exhibits, plus the testimony of eight named witnesses and "a copy of Judge's definition of manslaughter, second degree murder, [and] self-defense . . . ." In response to this request the court told the jury it would receive the exhibits and the definitions; explaining that no transcripts of testimony had been prepared, however, the court asked the jury to rethink its request for the testimony. The jury then retired for the night and was given the requested instructions and exhibits at 9:00 a.m. the next day. At 11:15 a.m. the jury returned with its verdict ("Guilty as charged, first degree murder"), having sent the court the following message earlier in the morning: "After reading in detail the definitions of crimes, we feel we do not need any testimony as requested . . . ."

III.

The conviction was appealed to the Court of Appeals of Michigan, where appellate counsel raised a single claim of error having to do with the provenance of the gun. By way of supplemental briefs filed *in propria persona*, Petitioner raised three additional claims of error, one of which was that there was insufficient evidence to warrant submission of the first degree murder charge to the jury. Although it acknowledged "a degree of sympathy for Defendant, who committed this murder after receiving a severe beating at the hands of the man who had accosted his pregnant wife," the Michigan court rejected these claims of error — properly, in our view — and affirmed the conviction in an opinion reported at 76 Mich. App. 71, 255 N.W.2d 774 (1977). The Supreme Court of Michigan denied review. *People* v. *Alexander*, 402 Mich. 826 (1977).

Several years later, after a petition for federal habeas corpus relief had been denied, the Michigan Court of Appeals granted an application for a second appeal. In his second appeal Petitioner contended that "the trial court erred by instructing the jury that the law implies malice from an unprovoked, unjustifiable or inexcusable killing." The Michigan Court of Appeals agreed that there had been instructional error in this respect, but held that the error "was harmless beyond a reasonable doubt, because defendant admitted the killing, but argued that it was justified by the necessity of self-defense."

Citing *Sandstrom* v. *Montana*, 422 U.S. 510 (1979), Petitioner also contended in his second appeal that the trial court had erred "by instructing the jury that the law presumes that every man intends the usual consequences which accompany his acts." The Michigan Court of Appeals agreed that such an instruction was forbidden in *Sandstrom*, but held, in reliance on *People* v. *Woods*, 416 Mich. 581, 331 N.W.2d 707 (1982), *cert. denied*, 462 U.S. 1134 (1983), that *Sandstrom* was not to be applied retroactively. "Moreover," the court held, "any error in giving this instruction was harmless beyond a reasonable doubt on this record, because defendant admitted intentionally shooting the victim." The Michigan Supreme Court denied review for a second time, and Petitioner then instituted his second federal habeas corpus proceeding. Claims of instructional error loom large in the second habeas petition.

Because Petitioner had sought a writ of habeas corpus in a prior federal proceeding, the present case might have been dismissed under Rule 9(b) of the Rules Governing Section 2254 Cases if the district judge had found that Petitioner's failure to assert his instructional error claims in the prior petition constituted an abuse

of the writ. The district court did not make such a finding, however, and elected to address the merits of the petition.

Comparing the passage where the Michigan trial court had charged that "If a man kills another suddenly and without provocation, the law implies malice and the offense is murder" with the language disapproved in *Sandstrom* ("[t]he law presumes that a person intends the ordinary consequences of his voluntary acts"), the district court declared that

> "[t]he instruction given in the matter at bar may be differentiated from the erroneous one in *Sandstrom*, for the trial court herein did not imply that a presumption of malice arose from Petitioner's acts. Instead, he charged that malice may be implied by the accused's conduct and the type of weapon used."

The district court evidently overlooked the portion of the Michigan trial court's charge stating that "The law presumes every man intends the usual consequences which accompany his acts . . . ." In any event, the district court concluded that "any error in jury instructions, which were [sic] attenuated by the court's charge that the burden of proof on the element of malice remained with the prosecutor, was harmless beyond a reasonable doubt." The writ was denied.

IV

We need not dwell at length on the question whether the Michigan trial court's charge contained error of constitutional dimension. Echoing the conclusion of the Michigan Court of Appeals, counsel for the State has conceded that it did.

The concession is hardly surprising. The key portion of the Michigan trial court's instruction on the element

of malice did not vary by so much as a jot or a tittle from the instructions considered by the Supreme Court of Michigan in *People* v. *Richardson*, 409 Mich. 126, 293 N.W.2d 332 (1980). Speaking for a unanimous court in *Richardson*, Justice Ryan — who is now a judge of this court — said of this common-form jury charge that

> "[t]he portion of the instruction which stated that *the law implies malice* 'from the unprovoked, unjustifiable, or inexcusable killing' or when 'a man kills another suddenly and without provocation' had the effect of withdrawing from the jury the essential factual issue of the existence of malice. The law, of course, does not imply malice from a sudden and unprovoked killing, and it was error to so instruct. The necessary factual element of malice may be permissibly inferred from the facts and circumstances of the killing, but it can never be *established as a matter of law* by proof of other facts." 409 Mich. at 143-44, 293 N.W.2d at 340 (citations omitted, emphasis in original).

In *Cook* v. *Foltz*, 814 F.2d 1109, 1111 (6th Cir.), *cert. denied*, 108 S.Ct. 1109 (1987), similarly, this court, speaking through Judge Keith, said this of the self same charge:

> "There is little question that the instruction . . . was *Sandstrom* error. The state carries the burden of proving every element of a criminal offense beyond a reasonable doubt and any jury instruction that shifts the burden is a violation of due process. *Sandstrom*, 442 U.S. at 523, 99 S.Ct. at 2459; *In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1072-1073."

The portion of the charge in which Petitioner's jury was told that "[t]he law presumes every man intends

the usual consequences which accompany his acts . . ." cannot be differentiated, on any meaningful basis, from the corresponding portion of the charge condemned by the United States Supreme Court in *Sandstrom*. This "presumption" charge is particularly troublesome in the case at bar because of the fact that immediately after saying that "[t]he law presumes every man intends the usual consequences which accompany his acts," the court added "but it is the claim of the Defendant in this case that what he did was in self-defense and that the deceased was the aggressor." By ignoring, at this point, Petitioner's claim that he acted in the heat of passion and without premeditation, the court may very well have given the jury to understand that if the claim of self-defense were rejected, the State would be entitled to the benefit of a legal presumption on the basis of which Petitioner could be found guilty of a more serious offense than the State would have been able to prove without the presumption.

Considering all of the challenged instructions in the context of the charge as a whole, and viewing them against the background of the particular evidence presented to the jury and the particular issues that the jury was called upon to decide in this case, we are satisfied that the instruction cannot pass constitutional muster. And as this court declared in *Cook* v. *Foltz*, 814 F.2d at 1111,

> "The fact that the *Sandstrom* error occurred before the *Sandstrom* decision is of no consequence. *Sandstrom* has full retroactive effect in this circuit 'since the instructional error would normally affect a defendant's right to a fair trial and impact upon the ultimate issue of innocence or guilt.' *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir.), *cert. denied*, 462 U.S. 1121,

> 103 S.Ct. 3092, 77 L.Ed.2d 1352 (1983). *See also McBee* [v. *Grant*, 763 F.2d 811 (6th Cir. 1985)]; *Williams* v. *Engle*, 683 F.2d 152 (6th Cir. 1982); *Krzeminski* v. *Perini*, 614 F.2d 121 (6th Cir.), *cert. denied*, 449 U.S. 866, 101 S.Ct. 199, 66 L.Ed.2d 84 (1980)."

The case at bar is not one in which we need be concerned with the question whether there was good cause for the failure of Petitioner's counsel to make a timely objection to the jury charge, or the question whether Petitioner was prejudiced thereby, or the question of cause and prejudice in connection with the failure to assert instructional error in the initial appeal. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Unlike *Cook* v. *Foltz*, where the denial of habeas relief was affirmed on the ground that the defendant's failure to make any contemporaneous objection gave the Michigan appellate courts an unassailable procedural basis for affirmance of the conviction on direct appeal, the present case is one in which the Michigan Court of Appeals waived the procedural defect, allowed a second appeal, and addressed the underlying constitutional question on the merits. Under these circumstances, we are obliged to do likewise.

V

As the Michigan Court of Appeals recognized, a conclusion that the jury instructions were tainted with *Sandstrom* error would avail Petitioner nothing if the error should be found, beyond a reasonable doubt, to have been harmless. See *Chapman* v. *California*, 386 U.S. 18 (1967), and *Rose* v. *Clark*, 478 U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). The Michigan court decided that the error was in fact harmless beyond a reasonable doubt, both "because defendant admitted

the killing, but argued that it was justified by the necessity of self-defense," and "because defendant admitted intentionally shooting the victim." The district court, stressing "the overwhelming evidence of petitioner's premeditation and deliberation in this case," agreed. Unlike the district court, we are not overwhelmed by the evidence of premeditation and deliberation, and we think the trial record discloses ample room for doubt that the error was harmless.

It is important, we believe, not to lose sight of the fact that a finding that Petitioner was guilty of murder in the first degree was not the only rational alternative open to the jury once it decided that Petitioner had not acted in self-defense. Had it not been for the erroneous instructions it received from the trial court, the jury, it seems to us, could well have found that although Petitioner did not act in self-defense, the State nonetheless failed to establish beyond a reasonable doubt that he acted with "malice aforethought and premeditation."

Absent a finding of malice, the jury could not properly have found Petitioner guilty of anything more than manslaughter. Absent a finding of premeditation, Petitioner could not properly have been convicted of a crime more serious than murder in the second degree. That Petitioner admitted pulling the trigger did not of itself establish either malice or premeditation. That Petitioner's act was not justified by a need to defend himself did not establish malice or premeditation either. Even though Petitioner did not act in self-defense, it is entirely possible that Petitioner shot the decedent without having "murder in his heart," as Petitioner's counsel repeatedly urged upon the jury — and we can have no way of knowing how the jury would have decided that question in the absence of instructions suggesting that the State could carry

its burden of proof through a presumption implied by law.

Here, as in *Francis* v. *Franklin*, 471 U.S. 307, 325-26 (1985), the facts did not "overwhelmingly" preclude the jury from finding in the defendant's favor on the question of his actual state of mind. Here, as in *Francis* v. *Franklin*, it cannot be said that the evidence was "so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Id.* at 326, quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 97 n. 5 (1983) (Powell, J., dissenting). And here, just as in *Francis* v. *Franklin*, "[t]he jury's request for reinstruction on the elements of malice . . . lends further substance to the . . . conclusion that evidence of intent was far from overwhelming in this case." 471 U.S. at 326.

In *Burton* v. *Foltz*, 810 F.2d 118, 121 (6th Cir.), *cert. denied*, 108 S.Ct. 327 (1987), speaking through Judge Milburn, noted that

> "[a]pplication of the harmless error standard permits the reviewing court to uphold the conviction *only* if it 'may *confidently* say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' *Delaware* v. *Van Arsdall*, ___ U.S. ___, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986); *see Merlo* v. *Bolden*, 801 F.2d 252, 257 (6th Cir. 1986)." (Emphasis supplied.)

The particular facts of *Burton* v. *Foltz* justified a measure of confidence in the jury's verdict, notwithstanding the instructional error, that would be unwarranted here. The facts of the present case more closely resemble those of *Merlo* v. *Bolden*, 801 F.2d 252 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1358 (1987). There, acknowledging that "the mere fact that [peti-

tioner] disputed the element of intent is not dispositive," we concluded that "the evidence is in such a balanced state that we cannot say beyond a reasonable doubt that it 'was so dispositive of intent . . . that the jury would have found it unnecessary to rely on the presumption' created by the erroneous *Sandstrom* instructions." *Id.* at 257, quoting *Connecticut* v. *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting).

The evidence in the case at bar is at least as evenly balanced as it was in *Merlo*. In that case the petitioner, a full two months before he shot and killed his estranged wife, had "slapped her a couple times," breaking her glasses; one month before the homicide he had smashed the dashboard of her car with a gun, leaving a bullet on the seat. The decedent in the present case, in contrast, was a total stranger to Petitioner. The decedent might well have been found to have accosted Petitioner's wife and given Petitioner a severe beating, in her presence, while she was being held by one of the decedent's companions. Whether or not Petitioner's wife urged him to shoot, Petitioner's response is surely as likely to have been a truly spontaneous act as was Mr. Merlo's killing of his estranged wife.

This is far from saying, of course, that Petitioner was in fact innocent of first degree murder, or that without the erroneous instructions the jury would not have found him guilty of first degree murder. It probably does Petitioner's trial counsel no injustice to suggest that he may have been facing, in the prosecutor who tried this case for the State, an advocate more skillful than himself — and whatever Petitioner's actual state of mind may have been, it is entirely possible that the jury would have concluded, regardless of what the trial court said in its charge, that Petitioner really did have murder in his heart. It is also possible that such a find-

ing would have been correct. In this country, however we try not to incarcerate people for life on the basis of possible guilt; guilt must be established beyond a reasonable doubt.

We assume that the jury in this case listened to the trial court's instructions carefully. That assumption is strengthened by the fact that the jury asked for a copy of the pertinent portion of the charge and, after reading it "in detail," withdrew its request for portions of the testimony. The jury may well have decided it did not need the testimony because it could find the elements of first degree murder on the basis of legal presumptions that have now been held not to exist.

On the record before us, we simply cannot allow Petitioner's first degree murder conviction to stand. The judgment of the district court is REVERSED, and the case is remanded with instructions to issue a writ of habeas corpus providing for Petitioner's release from incarceration unless the State of Michigan elects to retry Petitioner within 90 days of the date of the district court's order.

APPENDIX B

ORDER DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated December 9, 1986)

(ERNEST ALEXANDER, Petitioner, vs. DALE FOLTZ, Respondent — C. A. No. 86-CV-60257-AA; HON. GEORGE LA PLATA)

I.
INTRODUCTION

Convicted of first-degree murder by an Oakland County Circuit Court jury in 1975, Petitioner, Ernest Alexander, was sentenced to a mandatory term of life imprisonment. His conviction and sentence were affirmed by the Michigan Court of Appeals in a published opinion,[1] whereafter the Michigan Supreme Court denied his petition for certiorari.[2] Following two other journeys through the Michigan appellate court system, Petitioner filed an application for habeas corpus in this Court on May 13, 1986.[3]

Petitioner was charged with the slaying of one John Sweden on June 13, 1985, in Hazel Park, Michigan. Petitioner became enraged when he observed his pregnant wife conversing with Sweden at the Hazel Park

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[1] 76 Mich. App. 71, 255 N.W.2d 774 (1977).

[2] 402 Mich. 826 (1977).

[3] Michigan Court of Appeals Docket Nos. 49673 (1980) and 72565 (1985); Michigan Supreme Court Docket Nos. 66560 (1981) and 76698 (1985).

Race Track. When he confronted Sweden, an altercation ensued. Petitioner and his wife then departed from the scene, but he returned shortly thereafter, armed with a revolver, and fatally shot Sweden.

II.

APPLICATION FOR A WRIT OF HABEAS CORPUS

In his application for habeas corpus, Petitioner raised three issues:

1. During his closing argument, the prosecuting attorney improperly referred to Petitioner's invocation of his right to remain silent at the time of his arrest;

2. the trial court erroneously instructed the jury on the element of malice; and

3. the trial court erroneously charged the jury that the intent to kill may be inferred from Petitioner's deployment of a deadly weapon.

II[I].

IMPROPER, PREJUDICIAL CLOSING ARGUMENT

The allegedly improper segment of the prosecutor's closing argument, to which no objection was interposed at trial, contained comments about Petitioner's failure, at the time of his arrest, to exhibit remorse or regret. The purpose of the prosecutor's remarks was to discredit Petitioner's outburst of remorse while testifying at trial. The argument was not in violation of *People* v. *Bobo*[4] or *Doyle* v. *Ohio*[5], for it did not question Petitioner's silence at the time of his arrest, but, rather, was directed at highlighting the inconsistencies in

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[4] 390 Mich. 255, 212 N.W.2d 190 (1973).

[5] 426 U.S. 610 (1976).

Petitioner's deportment at trial and immediately following the homicide.[6] Therefore, no constitutional error emanated from the incisive comments of the prosecutor, but even if the Court had found such an error, it would have been deemed harmless in nature, in light of the overwhelming evidence adduced at trial.[7]

IV.

CLAIMED JURY INSTRUCTIONAL ERROR REGARDING ELEMENT OF MALICE

Petitioner maintains the burden of proof was impermissibly shifted when the trial court charged the jury that:

> If one without just cause inflicts a wrong upon another, we call him malicious so when one without any legal provocation, justification, or excuse, intentionally kills another, we call him a murderer. The law implies from an unprovoked, unjustifiable or unexcusable killing, the existence of that wicked disposition which the law terms malice aforethought. If a man kills another suddenly and without provocation, the law implies malice and the offense is murder.

In *Sandstrom* v. *Montana*,[8] the federal court of last resort enunciated that a jury instruction which provides that "the law presumes that a person intends the ordinary consequences of his voluntary acts" created a presumption of malice and, thus, placed the burden of

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[6] Post-arrest silence may be referred to on cross-examination to inquire into prior inconsistent statements of the defendant. *Anderson* v. *Charles*, 447 U.S. 404 (1980).

[7] Where a reference is improperly made to a defendant's post-arrest silence, a harmless error standard is applied to determine whether reversal is required.

[8] 442 U.S. 510 (1979).

proving lack of intent upon the defendant. The instruction given in the matter at bar may be differentiated from the erroneous one in *Sandstrom*, for the trial court herein did not imply that a presumption of malice arose from Petitioner's acts. Instead, he charged that malice may be implied by the accused's conduct and the type of weapon used. Based on the potent evidence of intent presented by the prosecutor, any error in jury instructions, which were attenuated by the court's charge that the burden of proof on the element of malice remained with the prosecutor, was harmless beyond a reasonable doubt.[9]

V.
JURY INSTRUCTION REGARDING USE OF DANGEROUS WEAPON

Inextricably connected with the foregoing claim of error is Petitioner's disenchantment with the following jury charge, to which he did not object to at trial:

> The instrument with which the killing was done may be taken into consideration because the intention to kill, in the absence of evidence showing a contrary intent, may be inferred from the use of a deadly weapon in such a manner that the death of the person assaulted would be the inevitable consequence.

In considering the totality of the jury instructions, this Court does not conclude that the trial court shifted the burden of proof on the element of intent by referring to the fact that a deadly weapon was used by Petitioner. The Court simply noted that the use of a lethal weapon is a factor for the jury to consider in

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[9] Under *Rose* v. *Clark*, 10 S.Ct. 3101 (1986), a *Sandstrom* instructional error is subject to a harmless error analysis.

determining whether Petitioner acted in self defense or was the aggressor as to his decision to deprive John Sweden of his life. It is noteworthy that after his initial conflict with Sweden, Petitioner threatened Sweden, departed from the scene to obtain a weapon, returned with the revolver and pointed it at Sweden while announcing, "Hey, what you gonna do now?," and then shot the victim twice in the chest at close range. After leaving the scene of the homicide, Petitioner discarded the weapon. At trial, Petitioner admitted that he intentionally shot the victim.

While finding that a *Sandstrom* error did not occur through the court's reference to the dangerous weapon used by Petitioner, the Court finds that if an error occurred, it was harmless beyond a reasonable doubt, based on the totality of the instructions and the overwhelming evidence of Petitioner's premeditation and deliberation.

VI.
CONCLUSION

Petitioner's application for a writ of habeas corpus is DENIED. The Court notes that Petitioner (1) has been convicted of first-degree murder by a jury, (2) obtained two adverse reviews of the conviction by the Michigan Court of Appeals, (3) filed an unsuccessful motion for a new trial at the trial court level, (4) was unsuccessful in convincing the Michigan Supreme Court to grant certiorari, and (5) obtained a review of his conviction by a federal district court.

/s/ GEORGE LaPLATA
U. S. District Judge

December 9, 1986 – Ann Arbor, MI

(*Certification Omitted*)

APPENDIX C

ORDER DENYING RECONSIDERATION

(State of Michigan — Supreme Court)

(Certified February 25, 1986)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ERNEST ALEXANDER, Defendant-Appellant – SC: 76698; COA: 72565; LC: 75-23712-FY)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 25th day of February in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable:

G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, DENNIS W. ARCHER, Associate Justices.

On order of the Court, the motion *in propria persona* for reconsideration of this Court's order of December 4, 1985, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Cavanagh, J., not participating.

(*Certification Omitted*)

APPENDIX D

ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Certified December 4, 1985)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ERNEST ALEXANDER, Defendant-Appellant – SC: 76698; COA: 72565; LC: 75-23712-FY)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 4th day of December in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable:

G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, Associate Justices.

On order of the Court, the delayed application *in propria persona* for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin, J., would grant leave to appeal to consider the retroactivity of *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979). In the Sixth Circuit, see, *e.g.*, *Conway* v *Anderson*, 698 F2d 282, 284 (CA 6, 1983); *Williams* v *Engle*, 683 F2d 152 (CA 6, 1982); *Krzeminski* v *Perini*, 614 F2d 121 (CA 6, 1980), *cert den* 449 US 866 (1980); *Burton* v *Bergman*, 649 F2d 428, 431, n 3 (CA 6, 1981), *vacated and remanded on other grounds* 456 US 953 (1983). Similarly, see *Guthrie* v

Warden, Maryland Penitentiary, 683 F2d 820, 823, n 3 (CA 4, 1982); *Bonnett* v *Solem*, 640 F2d 125 (CA 8, 1981); *Dietz* v *Solem*, 640 F2d 126, 130 (CA 8, 1981).

Cavanagh, J., not participating.

(Certification Omitted)

APPENDIX E

DECISION

(State of Michigan — Court of Appeals)

(Released May 24, 1985)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, -v- ERNEST ALEXANDER, Defendant-Appellant — No. 72565)

BEFORE: J. H. Shepherd, P.J.,
and D. E. Holbrook, Jr. and M. F. Sapala,* JJ.

PER CURIAM

After a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548. Defendant was sentenced to imprisonment for life, and this Court affirmed his conviction on his appeal by right. 76 Mich App 71; 225 NW2d 774 (1977). This Court subsequently granted defendant's delayed application for leave to appeal.

Defendant correctly points out that the trial court erred by instructing the jury that the law implies malice from an unprovoked, unjustifiable, or inexcusable killing. See *People* v *Richardson*, 409 Mich 126; 293 NW2d 332 (1980). This error, however, was harmless beyond a reasonable doubt, because defendant admitted the killing, but argued that it was justified by the necessity of self-defense. See *People* v *Plozai (On Remand)*, __ Mich App __; __ NW2d __ (No. 75817, *rel'd* 12/18/84); see also *People* v *Woods*, 416 Mich 581; 331 NW2d 707 (1982).

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* Recorder's Court judge, sitting on the Court of Appeals by assignment.

Defendant also contends that the trial court erred by instructing the jury that the law presumes that every man intends the usual consequences which accompany his acts. Such an instruction was forbidden in *Sandstrom* v *Montana*, 422 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979); however, in *People* v *Woods*, *supra*, 615-622, our Supreme Court concluded that *Sandstrom* should not be applied retroactively except to cases in which the issue was raised which were pending on direct appeal when *Sandstrom* was decided. Defendant's direct appeal did not raise this issue and was resolved before the *Sandstrom* decision. Moreover, any error in giving this instruction was harmless beyond a reasonable doubt on this record, because defendant admitted intentionally shooting the victim. Compare *Woods*, 416 Mich at 614-615.

Defendant also contends that certain remarks by the prosecutor in closing argument were improper under the rule stated in *People* v *Bobo*, 390 Mich 255; 212 NW2d 190 (1973). *Bobo* prohibits evidence and argument concerning a defendant's refusal to make a statement, except to rebut a claim by defendant that he made a statement.

Defendant made no objection to the remarks at issue here, and under such circumstances an appellate court will not afford the defendant any relief unless a failure to do so would result in a miscarriage of justice. *People* v *Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Referring to a tearful display by defendant during his testimony, the prosecutor asked:

> "If the defendant was genuinely tearful, remorseful about what happened on June 13th, 1975, why didn't he cry after he shot John Sweden that evening? None of the witnesses put

> tears in Mr. Alexander's eyes that evening. Where was the emotion and remorse when he had enough presence of mind to throw away the gun when he's being trailed by the police? Did the defendant cry when his car was stopped by the police and he was under arrest for attempted murder? No, He said I know. If he was so upset by killing John Sweden, how does he explain shedding no tears at the police department and, in fact, encouraging his wife not to make any comments?
>
> "Where was all his crying at the prior judicial proceeding? The simple knowledge is that there has been no prior showing of regret. It is only now when we reach the bottom line, now that we are trying this man for one of the most serious charges this State knows. The defendant's emotional outburst of regret in trial really has no bearing on the question of whether or not he killed John Sweden with premeditation."

The prosecutor did not refer to any refusal by defendant to make a statement; instead, he pointed to statements and conduct by defendant at the time of his arrest which were inconsistent with defendant's testimony and conduct at trial. *Bobo* does not forbid such argument. See *People* v *Richendollar*, 85 Mich App 74, 82; 270 NW2d 530 (1978), and *People* v *Collier*, 105 Mich App 46, 51; 306 NW2d 387 (1981). No miscarriage of justice is apparent here.

Defendant also contends that his trial counsel's hearing impairment prevented him from rendering defendant effective assistance. In *People* v *Boles*, 127 Mich App 759, 765-768; 339 NW2d 249 (1983), this Court considered a similar claim and concluded that a defense counsel's hearing impairment would not neces-

sarily prevent him from rendering effective assistance to his client. Nothing in the record here suggests that the defense counsel's handicap had any significant impact on his performance. Defendant points to instances where his counsel had testimony repeated. Rather than demonstrating ineffectiveness, these instances show that the counsel was careful to avoid problems resulting from his handicap. Defendant also points to several instances of apparent misunderstanding of argument or testimony, but there are no more instances of misunderstanding here than should reasonably be expected in a trial of this length and complexity, and none of these instances appear to have had a significant impact on the case. On this record, defendant has failed to demonstrate that his counsel's performance was ineffective under the standard stated in *People* v *Garcia*, 398 Mich 250; 247 NW2d 547 (1976), or *Strickland* v *Washington*, __ US __; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

AFFIRMED.

/s/ John H. Shepherd
/s/ Donald E. Holbrook, Jr.
/s/ Michael F. Sapala

APPENDIX F

[*EXCERPTED*] JURY INSTRUCTIONS

(State of Michigan – County of Oakland – Circuit Court)

(Proceedings of October 2, 1985)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, vs. ERNEST ALEXANDER, Defendant — No. CR 75-23712-FY)

* * *

[T. 959-961; emphasis added]:

The term malice as used in these definitions signifies a wrongful act done intentionally, without legal justification or excuse. The real test of malice is to be found in the presence or absence of adequate cause or provocation to account for the homicide. Possibly, I can make this clearer by an illustration. If one without just cause inflicts a wrong upon another, we call him malicious so when one without any legal provocation, justification, or excuse, intentionally kills another, we call him a murderer. The *law implies from an unprovoked, unjustifiable or inexcusable killing,* the existence of that wicked disposition which the law terms malice or forethought. If a man kills *another suddenly and without provocation, the law implies malice and the offense is murder.* If the provocation is such as must have greatly provoked him so that he acted from sudden passion caused by some great provocation, the killing would be manslaughter. The instrument with which the killing was done may be taken into consideration because the intention to kill, in the absence of evidence showing a contrary intent, may be inferred from the use of a deadly weapon in such a manner that

the death of the person assaulted would be the inevitable consequence.

A pistol is within the class of things the law defines to be a dangerous or deadly weapon.

The law presumes every man intends the usual consequences which accompany his acts but it is the claim of the [Respondent] in this case that what he did was in self-defense and that the deceased was the aggressor. Now, there are occasions when a killing of one person is excusable homicide. The only such occasion with which you are concerned here is the extent to which a man may go and defend himself under attack.

* * *

[T, 961-964; emphasis added]:

[I]t is the claim of the [Respondent] in this case that what he did was in self-defense and that the deceased was the aggressor. Now, there are occasions when a killing of one person is excusable homicide. The only such occasion with which you are concerned here is the extent to which a man may go and defend himself under attack.

Self-defense in proper cases is the right of every person but it will not justify the taking of a human life unless the jurors are satisfied from the testimony that: *1. That the [Respondent] was not the aggressor in bringing on the difficulty. 2. That there existed at the time of the shooting in his mind a present and impending necessity to shoot in order to save himself from death or some great bodily harm.* 3. That there must have been no way open whereby he could have retreated as it *appeared to him at the time of the shooting to a place of safety and have thus avoided the conflict.* If you find that one or more of these facts did

not exist in this case, then the plea of self-defense fails. On the other hand, if you find these three factors did exist, then the plea of self-defense is a good one.

That is again: 1. There's not the aggressor. 2. There was a present and impending necessity to shoot in order to save himself from death or some great bodily harm and 3. No way of retreating.

Now, in defending himself — now this goes to the amount of force used. In defending himself against the unlawful attack of another, a man is justified in resorting to such violence and the use of such force as the particular circumstances of the case may require for his protection. Now, the degree of force to be employed in protecting one's person must be in proportion to the attack made and must depend upon the circumstances of each particular case and imminence of danger as it appears to him at that time. The only purpose which justifies the employment of force against the assault is to defend one's self; that is the object to be attained and the man is only justified in using such an amount of force as may appear to him at the time to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. If he uses a kind of force towards his assailant in excess or out of proportion to what may be necessary to his own defense as it honestly may appear to him at the time, he himself is guilty of assault and the defense of self-defense fails.

It is proper for you to consider who made the first attack and if the [Respondent] was required to act at once. In the excitement and heat of an affray, he could not be expected to exercise that nice discretion and accurate judgment which a jury, by a careful sifting of the testimony of all the witnesses, aided by the argument of the counsel and charge of the Court, would be able to do; and therefore, his conclusion, though he

acted honestly and in good faith, might not be perfectly correct and just. If you find the [Respondent] did use more force than was actually necessary for self-protection but also find that he honestly believed at that time that he was using only so much force as was necessary for his own defense and if he acted honestly and in good faith in coming to that conclusion and if such a belief was reasonable on his part under the circumstances surrounding him that time and the situation as it appeared to him, *then he would not be guilty of an assault by reason of the use of such excessive force.*

On the other hand, if you should find that the [Respondent] did not act honestly and in good faith or that such a belief was not reasonable on his part under all the circumstances surrounding him at that time, then he would be guilty of an assault and his plea of self-defense would fail.

In order to rely on a defense of self-defense, the *[Respondent] is not required to prove self-defense. The burden is on the People to prove* beyond a reasonable doubt that the *[Respondent] did not act in self-defense.*